



Legal Update

November 2015

The SJC holds that a BB gun does not qualify as a “firearm” when used in an armed robbery pursuant to G.L. c. 265, § 17.

Commonwealth v. Garrett, No. SJC-11852, (2015):

Background: The defendant, Raheem Garrett, and his girlfriend used a BB gun to rob stores in the city of Pittsfield. The defendant first robbed a pizza shop while wearing a homemade black mask. The defendant pointed at the assistant store manager what appeared to him to be a gun, and demanded the money from the cash register while the defendant’s girlfriend acted as the getaway driver, waiting in her white GMC sport utility vehicle (SUV). During a second robbery, the defendant robbed a convenience store wearing a black mask and again using a BB gun.

Approximately two months later, the defendant and his girlfriend returned to the pizza shop. The same store manager recognized the mask and clothing worn by the robber as those worn during the previous robbery, and the weapon as the same one the prior robber had brandished. When the robber demanded that the store manager give him money, the manager recognized the robber's voice that of the first robber. The manager handed over the money and when the robber left the store, the manager saw a white SUV, either a GMC Jimmy or a Chevrolet Blazer, leaving the parking lot quickly and driving north without any headlights. The manager called 911 and the defendant and his girlfriend were arrested. The defendant was convicted on three indictments counts of armed robbery with a firearm while masked, in **For specific guidance on the application of these cases or any law, please consult with your supervisor or your department’s legal advisor or prosecutor.**

violation of G.L. c. 265, §17, and he appealed arguing that a BB gun does not satisfy the statutory requirement of a “firearm” within the meaning of G.L. c. 265, §17.

Conclusion: The SJC concluded that a BB gun does not satisfy the statutory requirement of a "firearm" within the meaning of G. L. c. 265, § 17, therefore the defendant's convictions of armed robbery by means of a firearm must be vacated.

Is a BB gun considered a firearm under the armed robbery statute?

The SJC first examined the armed robbery statute, G.L. c. 265, §17, and found that there is no explicit definition for a firearm contained in the statute nor were there any other statutes referenced within the statute.

Second, the SJC considered the legislation surrounding the gun laws in Massachusetts. The SJC concluded that there is nothing within the gun control act of 1998 that indicates the legislature intended to regulate BB guns in the same manner as firearms. Pursuant to G.L. c. 140, §121, a firearm is defined as “a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured.” Since this statute does not mention BB guns, the SJC determined that the legislators did not intend to regulate BB guns in the same manner as firearms. Additionally, the gun control act has always provided separate regulations for BB guns.

In prior cases, the SJC considered whether a BB gun would be treated like a firearm. The SJC established in the *Fenton* case that a person carrying an air gun could not be convicted of unlawfully carrying a firearm under G.L. c. 269, § 10(a), because an air gun was not a firearm. *Commonwealth v. Fenton*, 395 Mass. 92 (1985). According to the SJC’s analysis of G.L. c. 269 §12B, legislators were concerned with the actions of minors in possession of BB guns and that is why there were separate provisions for this type of situations. The SJC highlighted that adults are not subject to the same restrictions for possessing BB guns as minors. “Since G.L. c. 269, §12A and 12B were enacted in 1951, the Legislature has not amended the statutory scheme to provide explicitly that BB guns should be treated in the same manner as firearms for purposes of the gun control act.” The Legislature also has not amended the definition of a firearm to include air rifles or BB guns since the *Fenton* case.

In 1998 when the Legislature revised sentencing provisions for certain crimes including using a firearm during the commission of an armed robbery, the definition of firearm did not change to include BB guns nor did the Legislature expand the provisions for BB gun licensing to include adults. “If BB guns were construed as firearms, they would be subject to the entire gun

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control act which would require that only licensed dealers could sell BB guns pursuant to G.L. c. 140, §123; background checks would be mandatory before obtaining a license to possess a BB gun, G.L. c. 140, §131; and all BB guns would be required to bear serial identification numbers, G.L. c. 269, §11E. Even more troubling, if the gun control act were to apply to BB guns, all of the criminal statutes regulating the possession and use of firearms would apply to BB guns, and to the minors who are authorized to use BB guns under G.L. c. 269, §12B. For instance, G.L. c. 140, §131L(a), establishes that it is unlawful to store or keep any firearm ... in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. Bootstrapping BB guns into this requirement would impose a layer of regulation, with criminal penalties for any violation, upon the proper storage of BB guns. This potentially would subject a broad group of minors to severe adult criminal penalties, with the attendant negative consequence of an adult criminal record. The Legislature could not have intended such a result.”

Based on its review of the gun legislature in Massachusetts, the SJC concluded that a BB gun does not satisfy the statutory requirement of a "firearm" within the meaning of G. L. c. 265, § 17.

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